LING WAH PRESS SDN. BHD.

v.

PUSTAKA UTAMA PELAJARAN SDN. BHD. & 3 ORS.

HIGH COURT, SHAH ALAM
DATO' MAHADEV SHANKAR J.
[SUIT NO. 22-82-91]
19 JULY 1993

CONTRACT: Plaintiffs printing educational books and trial answer papers at request of 1st defendant - Letter of guarantee provided by 2nd & 4th defendants - Printing work completed and delivered to 1st defendant - 1st defendant refusing to pay bill - Question of law - Whether object of contract illegal - Plaintiffs failing to print address on first leaf of work books and name and address on trial answer papers - Whether in contravention of s. 11 of the Printing Presses and Publication Act 1984 - Whether enforceable contract.

PRACTICE & PROCEDURE: Order 14 RHC - Unconditional leave to defend granted by SAR - Appeal by plaintiffs - Triable issues.

STATUTORY INTERPRETATION: Printing Presses and Publication Act 1984 ss. 2, 3(2), (8), 11(1), (2), Schedule 1 - Whether names of printers are to be printed simultaneously with printing of publication - Time when document becomes a publication - When an offence is created under the Act.

WORDS & PHRASES: Printing Presses and Publication Act 1984 ss. 2, 3(2) and Schedule 1 - "document", "print", "printing presses."

The plaintiffs ran a printing press and the 1st defendant published educational books and trial answer papers which the plaintiffs printed at the 1st defendant's request from time to time. In consideration of the goods and services provided, the 2nd and 3rd defendants executed a letter of guarantee. The 3rd defendant was later released from the guarantee which was substituted by a fresh letter of guarantee as well as a contract of indemnity from the 2nd and 4th defendants. In 1989, the 1st defendant requested the plaintiffs to print copies of seven work books and four trial examination papers which were duly printed and delivered to the 1st defendant. The 1st defendant refused to pay the bill when presented contending that the contract was illegal as the plaintiffs had failed to print their address on the first leaf of the work books and their name and address on the trial answer sheets.

The plaintiffs filed a winding-up petition against the 1st defendant which was dismissed with costs by the Court. The plaintiff then filed this suit and applied for summary judgment and the defendants filed a counterclaim for damages in respect of the winding-up petition. Upon the learned Senior Assistant Registrar granting the defendants unconditional leave to defend, the plaintiffs filed an appeal. At the outset of the appeal the plaintiffs discontinued their action against the 3rd defendant who was awarded costs of the appeal and of the civil action.

The essential facts were undisputed. The sole issue before the Court was on a question of law, namely; whether the contract was in contravention of s. 11 of the Printing Presses and Publication Act 1984 (the Act) and therefore illegal.

Held:

[1] There was nothing in s. 11(1) of the Act which required the names of the printers to be printed simultaneously with the printing of the publication. In other words the section could be regarded as having been complied with, if the name and address of the printer was "printed" on the document before it was actually published. A document only became a publication when it was published i.e. made available for public consumption. By s. 2 of the Act, "document" meant any paper...on which is printed, typed, written or marked letters, figures...and includes a book and pamphlet. The work books and trial answer papers were documents within the Act. There was no statutory definition of the word "print". "Printing presses" have been defined as equipment capable of printing at a rate of 1000 impressions per hour or more. But in common parlance, "print" could include writing out manually in capitals, or applying writing with the use of a rubber stamp.

[2] Section 11(1) although mandatory in terms did not by itself create any offence. The offence was created by s. 11(2) of the Act and it arose when the document was published, reproduced, sold, circulated or distributed or was offered for such purposes. In other words mere possession of a document (e.g. a proof copy submitted for correction) on which the printer's name and address did not appear was not yet an offence. It was **the offer to publish or actual publication** of such a document which made the trans-

action illegal, and this went for other prohibited activities in s. 11(2). Consequently, it was the Court's view that when the plaintiffs printed the documents in question in the format required by the defendants, they had not yet committed any offence. The onus of ensuring compliance with s. 11(2) was on the 1st defendant. They could easily have returned the proof copies or the entire stock back to the plaintiffs and required the name and address of the printer to be added on. By failing to do this and using the publication in question, the 1st defendant alone contravened s. 11(2).

[3] The fundamental question was whether the consideration for the contract or the object of the contract was unlawful, in which case the contract would be unenforceable. There was nothing intrinsically unlawful in contracting with a printer to print work books and trial answer papers for the wholly laudable purpose of educating school children. In the circumstances, the Court was satisfied that the defence of illegality failed. The defendants could not rely upon their own wrong to excuse themselves from paying. If the true position under s. 11 was that, both the plaintiffs as printers and the defendants as publishers transgressed s. 11(2), the Court was still of the view that this was not the kind of illegality which would render the contract unenforceable.

[4] For the avoidance of doubt, the matter was adjourned into open Court from chambers where the Court gave final judgment to the plaintiffs for RM110,953.44 as claimed together with interest and costs both for the appeal and the suit and directed the 1st, 2nd and 4th defendants be jointly and severally liable. The counterclaim filed by the defendants was an unrelated matter and therefore the Court did not allow a stay of execution pending disposal of the counterclaim.

[Final judgment in favour of plaintiffs with interest and costs of appeal and the suit. Stay of execution pending disposal of defendants' counterclaim disallowed].

Cases referred to:

Bensley & Anor. v. Bignold [1822] 5 B & Ald 335; 106 ER 1214 ***(dist)***

Ooi Bee Tat Development Sdn. Bhd. v. Ooi Bee Tat [1985] 1 CLJ 449 ***(foll)***

Curragh Investment Ltd. v. Cook [1974] 1 WLR 1559 ***(cit)***

Co-operative Central Bank Bhd. v. Belaka Suria Sdn. Bhd. [1991] 3 MLJ 43 ***(foll)***

Menaka v. Lum Kum Chum [1971] 1 MLJ 91 ***(refd)***

Legislation referred to:

Printing Presses and Publication Act 1984, ss. 2, 3(2), (8), 11(1), (2), (3), Schedule 1

For the plaintiff - T.Y. Wu; M/s. K.C. Yap Kamaludin & Partners

For the defendants - Manjeet Singh; M/s. Adlan & Haji Suhaimi

JUDGMENT

Mahadev Shankar J:

The plaintiffs run a printing press. The first defendant publishes educational books and trial answer papers which the plaintiffs printed at the first defendant's request from time to time.

In consideration of these goods and services being provided, the second and third defendants executed a letter of guarantee on 23 September 1987. Subsequently the third defendant was released from this guarantee when the plaintiffs accepted in substitution a fresh letter of guarantee as well as a contract of indemnity on 24 February 1988 (the said indemnity) from the second and fourth defendants.

In 1989 the first defendant supplied the plaintiffs the negatives for the format of seven work books and four trial examination papers for printing. The plaintiffs carried out the order. The required number of copies of the seven work books and four trial answer papers (the said goods) were printed by the plaintiffs and delivered to the first defendant. The plaintiffs then billed the first defendant who did not pay.

Initially the plaintiffs filed a winding-up petition against the first defendant. This was dismissed with costs. The plaintiffs then filed this action and then applied for summary judgement. The Senior Assistant Registrar gave unconditional leave to defend. The plaintiffs appealed to this Court.

At the commencement of this appeal the plaintiffs discontinued their action against the third defendant so I immediately ordered that he be granted his costs up-to-date both in this appeal and in the civil action. We were left with the other three defendants against whom the plaintiffs confined their claim to a sum of

RM110,953.44 and interest thereon from the time this action was filed till realisation.

The essential facts are really not in dispute. The defendants admit that the said goods were ordered by and delivered to the first defendant. The only issue is a pure question of law.

The purported reason why the defendants say they are not liable was advanced for the first time after this action was filed. It was contended that the contract was illegal by reason of a contravention of s. 11 of the Printing Presses and Publication Act 1984 (the said Act). Therefore it was contended that the price of the said goods was irrecoverable both as against the first defendant on the contract for the supply of the said goods and as against the second and fourth defendants on the said indemnity.

The relevant portions of s. 11 of the Act reads as follows:

> 11. Printed document to bear name of printer and publisher.
>
> (1) Every publication printed or published within Malaysia shall have printed legibly in Bahasa Malaysia or the English language on its first or last leaf the name and address of its printer and publisher.
>
> (2) No person shall publish, reproduce, sell, circulate or distribute, or offer to publish, reproduce, sell, circulate or distribute any publication which does not have the name and address of the printer and publisher, or in the case of an audio recording, the name and address of the producer, conspicuously printed on the cover or container and any person who acts in contravention of this section shall be guilty of an offence
>
> (3) In the case of publication imported into Malaysia it shall be sufficient compliance with this section that the name of the printer, publisher or producer be conspicuously printed in any part of the publication or container.

It is to be noted that s. 11(1) only applies to publications printed **or** published within Malaysia in which case it must carry both the name and the address of its printer **and** publisher. However the location stipulated is the first **or** last leaf. This may be contrasted with s. 11(2) where the name and address must appear on the cover of an audio recording.

In the present case the defence of illegality is alleged to arise because the names of both the printer and publisher appeared on the first leaf of the work books with the address of the publisher but not the printer, and because the trial answer papers contained the first defendant's logo on the cover page and name and address on the last page but neither the name nor address of the plaintiff.

By s. 2 "document" means any paper ... on which is printed, typed, written or marked letters, figures ... and includes a book and pamphlet. The work books and trial answer papers were documents within the Act. But there is no statutory definition of the word "print". Printing presses have been defined as equipment capable of printing at a rate of 1000 impressions per hour or more. (See s. 3(2) and Schedule 1). But in common parlance "print" could include writing out manually in capitals, or applying writing with the use of a rubber stamp.

It must also be noted that there is nothing in s. 11(1) which requires the names of the printers to be printed simultaneously with the printing of the publication. In other words the section could be regarded as having been complied with, if the name and address of the printer is "printed" on the document before it is actually published. A document only becomes a publication when it is published i.e. made available for public consumption.

Counsel for the plaintiff was at pains to point out that if s. 11 was rigidly applied the printer's name and address would have to be put on every visiting card. He seems to have overlooked s. 3(8) of the Act which excludes from the statutory requirement of a licence to use a printing press, "... the printing of any visiting or business card ... or any ...document whatsoever ... printed ... in the ordinary course of business ... not being a printing or publishing business, or for any other lawful object or purpose."

For the purposes of the present case it is not necessary for me to decide whether, notwithstanding s. 3(8) of the Act, s. 11 imposes a legal liability to have the printer's name and address shown on visiting cards, letterheads or other documents printed for any other lawful object or purpose.

The only issue here is whether the plaintiffs did something illegal when they delivered to the first defendant the work books and trial answer

papers without their address on the first leaf of the work books and without their name and address in the trial answer sheets..

As to this, let it be noted that s. 11(1) of the Act although mandatory in terms does not by itself create any offence. The offence is created by s. 11(2) of the Act and it arises when the document is published, reproduced, sold, circulated or distributed or is offered for such purposes. In other words mere possession of a document (e.g. a proof copy submitted for correction) on which the printer's name and address does not appear is not yet an offence. It is the offer to publish or actual publication of such a document which makes the transaction illegal, and this goes for the other prohibited activities in s. 11(2).

Consequently it is my view that when the plaintiffs printed the documents in question in the format required by the defendants, they had not yet committed any offence. The onus of ensuring compliance with s. 11(2) was on the first defendant. They could easily have returned the proof copies or the entire stock back to the plaintiffs and required the name and address of the printer to be added on. By failing to do this and using the publications in question, the first defendant alone contravened s. 11(2)of the Act. Section 11(2) does not say "No person shall **print** or publish ..."

Whilst we are on this, I must also say I do not agree with defence Counsel's submission that the entry required should appear on the cover. We are not concerned here with an audio-recording where this is imperative. The first leaf means the first page.

In the result I am satisfied that the defence of illegality fails. The defendants cannot rely upon their own wrong to excuse themselves from paying.

If I am mistaken, and the true position under s. 11 is that, both the plaintiffs as printers and the defendants as publishers transgressed s. 11(2), I am still of the view that this is not the kind of illegality which will render the contract unenforceable.

Defence Counsel relied heavily on *Bensley & Anor. v. Bignold* [1822] 5B & Ald 335; 106 ER 1214. The Court was there concerned with s. 27 of the Statute 39 G.3 c.79 whereby a printer who failed to print his name and address on a pamphlet on insurance was denied his charges for printing and paper. Defence Counsel submitted that this case was on all fours with the present. Defence Counsel must be complimented on his industry in discovering this case which does not appear to be referred to in any text books he could identify. But with the greatest respect that case cannot apply because the English section made it an offence for the printer not to print his name on the document when printing the document, and provided a penalty for not doing so in the same section. The words are not in *pari materia*.

Even were it otherwise, I would not have accepted this ancient English decision as good authority in Malaysia.

I did not get answers which satisfied me when I asked the defence Counsel whether one should countenance a situation where a passenger refused to pay a taxi driver who had completed the journey undertaken, because it was found at the end of it, that he had forgotten to renew his driving licence, or had slightly exceeded the speed limit. In all such cases the fundamental question is whether the consideration for the contract or the object of the contract was unlawful. To put it another way we must ask ourselves whether the contract was entered into with the object of comitting an illegal act, in which case the contract will be unenforceable. There is nothing intrinsically unlawful in contracting with a printer to print work books and trial answer papers for the wholly laudable purpose of educating school children.

The considerations which apply where a statute makes illegal some act incidental to an otherwise lawful transaction have been considered in depth by Y.A. Tan Sri Edgar Joseph Jr. SCJ (as he now is) in *Ooi Bee Tat Development Sdn. Bhd. v. Ooi Bee Tat* [1985] 1 CLJ 449 where the Court adopted and applied *Curragh Investment Ltd. v. Cook* [1974] 1 WLR. 1559. It is not enough that there was some incidental act or omission which was made punishable. The test is whether the real objective of the Act was to make the contract unenforceable. Y.A. Lim Beng Choon J. also dealt with the matter in *Co-operative Central Bank Bhd. v. Belaka Suria Sdn. Bhd.* [1991] 3 MLJ 43. Headnote (3) of this decision reads:

> (3) The Court held that the loan given to the borrower secured by the charge was permissible under s. 30 of the 1948 Act. The consideration or object of the charge agreement was

therefore not forbidden by law. The infringement of s. 9 of the Banking Act 1973 did not render the charge agreement a nullity. The plaintiff may be liable to a penalty imposed under s. 9(2) of the Banking Act 1973, but the penalty imposed by the said Act could not affect the charge agreement which the plaintiff was allowed to enter into under the 1948 Act.

These decisions would apply in the present case even if the plaintiffs had transgressed s. 11(2) of the Act (which I hold they have not) and the defence of illegality fails.

Consequently it is not necessary for me to have recourse to *Menaka v. Lum Kum Chum* [1971] 1 MLJ 91 where even though the statute provided that the contract was unenforceable the Court permitted recovery by applying s. 66 of the Contracts Act 1950.

Nor do I need to go into the niceties of whether because the contracts they executed was not merely one of guarantee, but one of indemnity, the second and fourth defendants are liable regardless of the alleged illegality. That issue would only have arisen for consideration, if the Court held the first defendant free from liability by reason of illegality.

These are the reasons why I gave judgement for the plaintiff for RM110,953.44 as claimed together with interest thereon at 8% p.a. from 9 October 1989 till realisation with costs both for this appeal and for the action and directed the first, second and fourth defendants to be jointly and severally liable.

For the avoidance of doubt, I informed the parties that this matter was adjourned into Open Court from Chambers and this is therefore a final judgement.

The counterclaim which the defendants have filed for alleged damages and costs in respect of the unsuccessful winding-up petition presented earlier by the plaintiffs, is really an unrelated matter and therefore, there will be no stay of execution pending the disposal of the counterclaim.

LOW TONG NAM

v.

SELVARAJU A/L PALINI & ANOR.

HIGH COURT, SHAH ALAM
DATUK WIRA WAN YAHYA BIN
PAWAN TEH J.
[CS NO. 23-53-90]
25 JANUARY 1994

TORT: Road accident - Vehicles travelling in opposite directions - Plaintiff encroaching into defendant's path - Reliance on oral evidence of plaintiff and defendant only - Plaintiff substantially to blame - Contributory negligence by the defendant.

This was a claim by the plaintiff for damages arising from a collision between his motor car and the defendants motor lorry.

The plaintiff claimed his car was travelling two feet from the centre of the white line on his side of the road, when an oncoming lorry, driven by the first defendant and owned by the second defendant, collided into his vehicle. On the contrary,the first defendant claimed that the plaintiff, while overtaking another vehicle parked on his side of the road, knocked into the front tyre of the defendants' vehicle. There being no testimony by any witness, the Court deliberated purely on the oral evidence of the plaintiff and the defendant together with the sketch plan.

Held:

[1] It is well settled principle of law that where there is a collision between two vehicles travelling in opposite directions on a road, then in the absence of special circumstances, there is a *prima facie* presumption that both drivers were negligent and the onus falls on each of them to show that the other driver rather than himself was negligent.

[2] The plaintiff was substantially liable based on the finding that the collision occurred while the plaintiff, overtaking a vehicle on its side of the road, strayed into the lawful path of the oncoming lorry without a proper look out.

[3] The defendant was not free from blame. The last minute action by the defendant to slow his vehicle could only have happened either because he was not paying sufficient attention to the condition and situation of the vehicle on